IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

PETERSON FARMS, INC.'S MOTION TO COMPEL
WITH REGARD TO PLAINTIFFS' AGENCY PRIVILEGE LOGS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

PETERSON FARMS, INC.'S MOTION TO COMPEL
WITH REGARD TO PLAINTIFFS' AGENCY PRIVILEGE LOGS

Defendant, Peterson Farms, Inc. ("Peterson"), hereby submits its Motion to Compel with regard to the privilege logs submitted by Plaintiffs (the "State") encompassing its hard copy document production from certain of its agencies and departments. Specifically, Peterson requests the Court enter an Order striking the purported claims of privilege for certain of the documents the State is withholding from production, and compelling the State to produce the subject documents immediately.

Before filing the instant Motion, the undersigned initiated multiple telephone conferences with attorneys for the State, in a good faith attempt to resolve the issues discussed herein in accordance with N.D. LCvR 37.1; however, as described in further detail below, Peterson's attempts to resolve this matter without the intervention of the Court were fruitless.

I. INTRODUCTION

Since the filing of this lawsuit, Peterson and the other Defendants have endured perpetual frustration in their efforts to discover the factual basis for the State's claims as well as the extent of the State's knowledge and management of the multitude of potential sources of the alleged pollutants within the Illinois River Watershed ("IRW"). This Motion is but one more chapter detailing the State's discovery conduct in this lawsuit in disregard of the Federal Rules of Civil Procedure, and most remarkably, its own Open Records Act. Peterson brings this matter to the Court to address the State's repeated refusal to submit privilege logs for certain of its agency and department hard copy document productions that comply with federal law and Oklahoma law, including Oklahoma's Open Records Act. Concomitant with its failure to describe and support its claims of privilege to meet federal and state standards, the State is withholding relevant and

responsive documents from the Defendants, which it should have produced many months ago. This conduct is prejudicial to the Defendants' ability to assess the State's claims and to prepare their defenses.

On September 18, 2007, Peterson served upon the State Requests for Production of Documents specifically directed at the Oklahoma Department of Environmental Quality ("ODEQ"), the Oklahoma Water Resources Board ("OWRB"), the Oklahoma Conservation Commission ("OCC") and the Oklahoma Scenic Rivers Commission ("OSRC"). Additionally, Peterson served Requests for Production of Documents to the State generally on March 30, 2007. In the subsequently scheduled document reviews, the State also identified documents which it alleges are responsive to Cargills' discovery requests at the Oklahoma Secretary of the Environment.

Over the ten months following the service of Peterson's agency-specific Requests for Production of Documents, the Defendants have participated in document reviews at each of these agencies. In most instances, the Defendants received a privilege log during the document review.[1] After Peterson received the Privilege Logs from the ODEQ, OWRB and OCC document reviews, it became readily apparent that multiple problems existed with the privileges and protections that the State was asserting. The overarching issue with the State's agency privilege logs is the State's blatant and deliberate refusal to provide sufficient information for Defendants to evaluate the State's claims of privilege. In turn, it appears that the State is withholding a significant number of responsive and relevant documents under unfounded claims

[1] The Defendants did not receive the privilege log for the OSRC until two days after the completion of the document review. On March 15th and 16th of this year, the Defendants participated in a document review at the OSE. The Defendants never received an original privilege log from the OSE. Rather the Defendants received a Revised Privilege Log for the OSE on May 4, 2007, over six weeks after the document review.

of attorney-client and attorney work product privileges. Peterson on behalf of the Defendants in this matter requests the Court enter an Order striking certain unfounded claims of privilege and compelling the immediate production of the documents improperly withheld by the State.

II. RELEVANT FACTS

1. On January 24, 2007, the Defendants had a telephone conference with the State to discuss these issues wherein the State agreed to revise its privilege logs to provide more sufficient descriptions.

2. On March 19, 2007, almost two months later and after the State had failed to provide the revised logs it had agreed to produce in January, Peterson informed the State of its specific issues with the original privilege logs provided for the ODEQ, OSRC, OCC, OSE and OWRB, and further requested a Rule 37 conference. (Exhibit 1, Letter from N. Longwell to D. Riggs and L. Bullock dated March 19, 2007.)

3. On April 6, 2007, the Parties' second Rule 37 conference, the State agreed to provide Revised Privilege Logs for each of the State agencies which would (purportedly) address the majority of Peterson's concerns no later May 4, 2007. The Parties also discussed Peterson's request that the State to identify for each claim, the status of the action, investigation, or litigation that the documents was related to in order to permit Peterson and the Court to fully and effectively evaluate the State's claims of privilege. The State refused to address these deficiencies in the conference, but indicated it would respond later in writing. (Exhibit 2, E-mail from N. Longwell to T. Hammons regarding Rule 37 telephone conference dated April 4, 2007.)

4. On April 11, 2007, the State refused to provide additional information regarding the status or identity of the action, investigation or litigation for which an alleged privilege document was prepared. (Exhibit 3, Letter from T. Hammons to N. Longwell dated April 11, 2007.)

5. On May 4, 2007, the State provided its Revised Privilege Logs for hard copy documents produced from ODEQ, OCC, OWRB, OSRC and OSE. (Exhibit 4, Revised Agency Privilege Logs.)

6. The Revised Privilege Logs produced to the Defendants still contained multiple deficiencies including the State's failure to identify the investigation, claim, action or litigation wherein the document was created, and failure to identify whether the document is part of a pending investigation, claim, action or litigation.

7. On June 19, 2007, in a second attempt to resolve the above issues, Peterson requested the State to: (a) provide justification for significant changes regarding dates, recipients and subject matter for certain entries from the original Privilege Log to the Revised Privilege Logs; (b) produce those documents that the State withdrew from its original Privilege Log; (c) for its attorney-client privilege claims, identify whether the document over which it is claiming

privilege is a part of a pending investigation, litigation, claim or action by the agency, and how the production of that document would seriously impair the claim, investigation or litigation; and (d) for its work product claims, identify whether the documents were created as a part of a prior litigation or prior anticipated litigation or were simply the result of an agency matter; identify the name of that specific litigation or anticipated litigation; and identify whether the litigation is still pending. (Exhibit 5, Letter from N. Longwell to T. Hammons dated June 19, 2007.)

8. On June 26, 2007, the State responded stating that: (a) it would produce the documents it had withdrawn from its privilege log, which were not merely duplicative entries, (but did not commit to a production date); (b) that any significant changes regarding dates, recipients and subject matter were made to provide a better description of the document, but it committed to review those changes for accuracy; (c) for its attorney-client privilege claims, it refused to indicate whether the document was from a current or former investigation or litigation; and (d) for its work product claims, it refused to identify whether the documents were created as a part of an anticipated or prior investigation. (Exhibit 6, Letter from S. Gentry to N. Longwell dated June 26, 2007.)

9. On July 2, 2007, the Parties held their Rule 37 conference. The State refused to address Peterson's concerns regarding the claims of attorney-client privilege and work product protections. The State also indicated that it would produce any document that it had withdrawn from the original privilege log, which was not merely a duplicative entry, no later than July 20, 2007, and provide justification for the major substantive changes identified by Peterson between the original and revised privilege logs no later than July 13, 2007. (Exhibit 7, Letter from N. Longwell to S. Gentry dated July 2, 2007).

10. As of the date of the filing of this Motion, the State has not produced the documents that it withdrew from the original privilege log. Even though the State has indicated that some of the issues with the substantive changes were the result of error, it has failed to either provide a second revised privilege log or justify the major substantive changes to the identified authors, recipients and subject matter as outlined in Peterson's June 19, 2007 letter.

III. ARGUMENT AND AUTHORITY

A. THE STATE MUST PROVIDE A PRIVILEGE LOG WHICH COMPLIES WITH FED. R. CIV. P. 26 AND N.D. LCvR 26.4.

The Federal Rules of Civil Procedure require the State to provide specific information on its privilege logs sufficient for the Defendants and the Court to determine whether the privilege claim applies. Many of the entries on the Revised Privilege Logs for the ODEQ, OCC, OSRC, OWRB and OSE fail to meet this standard. As an initial matter, LCvR 26.4(a) states that:

> [W]hen a claim of privilege or work product protection is asserted in response to a discovery request for documents, the party asserting the privilege or protection

> shall provide the following information with respect to each document in the form of a privilege log: the type of document; the general subject matter of the document; the date of the document; the author of the document, whether or not the author is a lawyer; each recipient of the document; and the privilege asserted.
>
> The federal rules provide further that:
>
> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things no produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

FED. R. CIV. P. 26 (b)(5). As Peterson will establish, the State has completely failed to meet its burden of proof regarding its claims for privilege as set out under federal and Oklahoma law.

B. STATE HAS FAILED TO PROVIDE INFORMATION SUFFICIENT ON ITS LOGS TO ESTABLISH ITS CLAIMS OF ATTORNEY-CLIENT PRIVILEGE

1. The Law of Attorney-Client Privilege under Oklahoma law Applies to the Documents and Communications Identified on the State's Logs.

In addressing the sufficiency and propriety of the State's privilege claims, the Court must consider both federal and Oklahoma law since the State has asserted both federal and state claims in this action. *See Motley v. Marathon Oil Co.*, 71 F.3d 1547 1551 (10th Cir. 1995); *see also Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1368 (10th Cir. 1997). Federal Rule of Evidence 501 provides in part that in respect to an element of a claim or defense in a civil action as to which state law applies to the decision, privilege shall be determined in accordance with state law. *See id.*

This case implicates the federal rules, as well as Oklahoma law, namely the statutory privileges in OKLA. STAT. tit. 12, § 2502, and the Open Records Act, OKLA. STAT. tit. 51, § 24A.1, *et seq.* (the "ORA"). Of particular importance to the Court's analysis is the policy

established by the Oklahoma Legislature, which created a strong presumption that the records of the State should be open for all to see, to wit:

> [I]t is the public policy of the State of Oklahoma that the people are vested with the inherent right to know and be fully informed about their government…. The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so that they may efficiently and intelligently exercise their inherent political power…. Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept form public access: provided, the person, agency or political subdivision shall at all times bear the burden of establishing such records are protected by such a confidential privilege.

OKLA. STAT. tit. 51, § 24A.2.

If a subdivision of the State seeks to withhold any records from the public, it bears a strict burden to establish the existence of one of the limited number of express exceptions detailed in the ORA. The exceptions include "records protected by a state evidentiary privilege such as attorney-client privilege, the work product immunity from discovery and the identity of informer privileges." OKLA. STAT. tit. 51, § 24A.5(1)(a). Moreover, even though "the Attorney General of the State of Oklahoma and agency attorneys authorized by law. . .may keep its litigation files and investigatory reports confidential," the State must produce the records if the public official is using or has taken records for investigatory purposes and placed them in a litigation or investigation file, when the records would otherwise have been subject to disclosure under the ORA. OKLA. STAT. tit. 51, §§ 24A.12 and 24A.20.

Thus, the only documents under the Open Records Act that are protected from production are those, which are protected by Oklahoma's attorney-client privilege, attorney work product doctrine, or which are a part of the investigatory or litigation files of the Attorney General, district attorney, agency attorney or municipal attorney. The privilege must have applied to the record at the time of its creation. Accordingly, the Office of the Attorney General, nor its outside

counsel can protect a record formerly within the scope of disclosure under the ORA simply by the act of moving it to or claiming that it is now part of its litigation or investigation files in this case.[2]

For a document to be confidential under the ORA, it must be protected by a state evidentiary privilege. The attorney-client privilege under Oklahoma law is governed by OKLA. STAT. tit. 12, § 2502. Oklahoma law provides a client the privilege to refuse to disclose or prevent the disclosure of confidential communications that were made for the purpose of obtaining or "facilitating the rendition of professional legal services to the client." *Id.* at § 2502(B). However, the statute provides an exception as it relates to communications between a public agency and its attorneys, to wit:

There is no privilege under this rule:

> As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

Id. at § 2502(D)(7). Thus, to establish protection under the ORA, the State has the burden of also establishing that the communication involves a currently pending investigation, claim, etc., plus it must make a showing that the disclosure will seriously impair its ability to resolve the pending matter. *Id.* This is the very foundational information, which the State has steadfastly refused to provide on its logs.

As described in detail below, the State has asserted privileges over documents identified in the regular files of the responding agencies. The Oklahoma Attorney General has himself

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[2] The Act also mandates that even though a document may be properly identified as confidential "[a]ny reasonable segregable portion of a record containing exempt material shall be provided after deletion of the exempt portion." OKLA. STAT. tit. 51, § 24A.5 (1)(a).

authored opinions condemning such practices and gamesmanship. By his own words, although a document may be located in the state attorney's investigation or litigation file, if the state subdivision kept the record in another file that is not subject to the confidentiality provisions of the ORA, the document located in the other file is not privileged. 29 Okla. Op. Atty. Gen. 280, 1999 WL 652454 citing OKLA. STAT. TIT. 51, § 24A.20. Furthermore, the Oklahoma Supreme Court has stated that even though a document may be maintained in a state or municipal attorney's litigation or investigation file, the protections under the ORA extend only so long as the investigation or litigation is pending. *Saxon v. Macy*, 795 P.2d 101, 102 (Okla. 1990). This reasoning correlates directly to the public record exclusion within Oklahoma's attorney-client privilege statute.

The State is basing its claims on both Oklahoma and federal common and statutory law. Despite the State's multiple counts, it possesses only one cause of action against each Defendant based upon its single statement of operative alleged facts, *i.e.*, the alleged injury stemming from the land application of poultry litter. (Dkt. No. 1215, Second Am. Complt.) The federal courts have recognized that cases involving both state and federal claims can create tension between the laws of one jurisdiction, which may require disclosure of documents, and the laws of another, which may allow the maintenance of privileges. The Tenth Circuit has directed trial courts to find an analytical solution to accommodate the potentially conflicting policies embodied in state and federal privilege law. *See Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1368 (10th Cir. 1997). Other circuits have also recognized the need for courts to honor state statutes which grant access to information.

The circumstances in this case are similar to those in *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455 (N.D. Ca. 1978). In *Perrignon*, the allegedly privileged information sought

by the plaintiffs from the defendants was relevant to both the federal and state claims. The court found that a literal reading of FED. R. EVID. 501 would appear to require a court to apply the federal common-law of privilege to federal claims and state law to state claims, but when the evidence goes to both federal and state law claims the court noted that such an application would result in an inconsistency. *Id.* 458. The court concluded that when a document is privileged under federal common-law, but not under state law, "it would be meaningless to hold the communication privileged for one set of claims but not for the other." *Id.* Consequently, once the confidentiality of a document has been broken, the privilege is no longer applicable. *See id. EEOC v. Illinois Dept. of Employment Security*, 995 F.2d 106, 107 (7th Cir. 1993) (refusing to apply an Illinois statute which held unemployment compensation proceedings confidential).

In this instance, the State bases its federal and state law allegations upon the same set of facts. Moreover, unlike the state statute at issue in *EEOC,* Oklahoma's law strongly favors access to public records rather than prohibiting their production. Where Oklahoma's privilege law and ORA dictates the disclosure of records, the State must produce them without regard to the existence of federal claims. The logic is strikingly simple. If any Oklahoma citizen can obtain these records under an ORA request, there is simply no basis for the State to refuse to produce them in this lawsuit.

The State must follow the mandates set out by the Oklahoma Legislature as to the disclosure of its records. Given the State's refusal to set forth the foundational requirements to support such claims under the foregoing Oklahoma laws, its claims are of no effect, and the records so identified should be produced forth with.

2. State Has the Burden to Support its Claims of Attorney-Client Privilege as To Each Entry on its Agencies' Privilege Logs.

Although there are many deficiencies with the State's privilege logs such as insufficient: (1) dates; (2) identification of individuals involved in the transaction; and (3) subject matter descriptions, the overarching issue is the State's withholding documents without establishing that they were created as a part of an active or pending investigation, action or litigation. Based upon the elements of attorney-client privilege as enumerated under both federal case law and Oklahoma statutory law, the State must demonstrate as to its claim of attorney-client privilege for each entry on the privilege that the holder of the privilege is the client by showing that:

1. the individual(s) listed is authorized to speak or act on the agency's behalf regarding the subject matter of the communication;
2. the individual(s) to whom the communication was made is an attorney and that the communication was made in connection with that person's role as an attorney; and
3. the communication related to a fact of which the attorney was informed by his client without the presences of strangers and for the purpose of securing legal advice, services or assistance.[3]

As stated previously, Oklahoma law adds the additional burden upon the State for claims of privilege by an Oklahoma state agency to show that any communication over which the State claims privilege is from a pending investigation, claim or action.

The State has simply not met its burden as to those entries contested by Peterson. (Exhibit 8, Contested Attorney-Client Privilege Claims on Revised Agency Privilege Logs.)[4] Unfortunately, the reasoning behind the State's refusal to provide this information to Peterson is clear. The Defendants believe the State has in its files records that establish that the

[3] *See Wyoming v. U.S. Dept. of Agriculture*, 239 F.Supp.2d 1219, 1229 (D. Wyoming 2002); *In re Grand Jury 90-1,*, 758 F.Supp. 1411, 1413 (D.Colo. 1991); *see also Andritz Sprout-Bauer v. Beazer East*, 174 F.R.D. 609, 633 (M.D. Penn 1997).

[4] Exhibit 8 consists of only those documents listed on the ODEQ, OCC, OSE, OWRB and OSRC revised privilege logs for which Peterson contests the applicability of the State's attorney-client privilege claims.

environmental conditions in the IRW stem from entities and activities other than poultry operations. By its spurious privilege claims, the State is attempting to cloak this relevant evidence from Defendants' view.

The State's failure to comply leaves Peterson and the Court to guess by date and subject matter, where available, whether the communication is a part of an active action, investigation or claim. Generally, on the revised the privilege logs, the State has identified thirty-seven categories of subject matter ranging from 1980 to the present over which the State is claiming privilege. (Exhibit 9, Subject Matter Issues.)[5] Those categories include communications related to the City of Watts irrigation site, Sequoyah Fuels (a uranium plant), Jock Worley (a mining permitee), Oklahoma/Arkansas Compact Commission, Lake Frances, Fayetteville Wastewater Treatment Plant, Adair Co. Rural Water Dist. #5, and an investigation of a septic system.

By way of example, there are 17 entries on the ODEQ privilege log which deal with the activities of Jock Worley with dates ranging from March 31, 1995, to October 24, 2005. (Exhibit 8, ODEQ Revised Privilege Log Nos. 81, 84, 86-92, 94-95, 97-98, 105-106). Lacking adequate descriptions to support the privilege claim, Peterson is left to draw conclusions as to three conceivable reasons for the State's withholding the documents:

1. The State is attempting to take any communications concerning any potential source of pollution to the IRW such as Jock Worley's operations, whether a part of an active investigation, litigation or claim, or not and blanket them in a claim of privilege deriving solely from this litigation;

2. An investigation is currently pending against Jock Worley, and the State is trying to blanket in privilege any communications concerning any prior investigation, claim, action or litigation against Jock Worley's activities within the IRW; or

[5] Exhibit 9 lists the thirty seven different categories of subject matter descriptions for the documents over which the State has claimed privilege that Peterson is contesting by agency and log number.

3. The investigation, claim or action against Jock Worley has been pending for over 10 years, which is unlikely.

Only scenario No. 3 could give rise to a valid privilege claim. The State cannot use this litigation as an all encompassing basis to freely assert privilege over any state records it chooses. The Oklahoma Statutes specifically prohibit it. As guidance, the Oklahoma ORA directly prohibits a state agency from taking documents which would not otherwise be covered by privilege or confidentiality and putting them into an active litigation file in an attempt to block their disclosure. OKLA. STAT. tit. 51, § 24A.20. Moreover, it does not appear that these documents necessarily came from an agency attorney's files.

In sum, even assuming *arguendo* that the third scenario as to Jock Worley is true, the State has still not met its burden pursuant to OKLA. STAT. tit. 12, § 2502 (D)(7). Even had the State set forth that these records are part of an active investigation or pending litigation, it must still present evidence that the production of these records would "severely impair" the agency's ability to process the claim or conduct the pending investigation. The State has failed to fulfill its obligation with regard to these and most every other entry on its agencies' privilege logs. (*See* Exhibit 8).

The State's improper conduct is not limited to these documents. For example, OCC Revised Privilege Log No. 12 states that it is a 1989 letter from Ed Fite, OSRC Executive Director to Trevor Hammons, AAG regarding Lake Frances as a public nuisance. Defendants believe that the conditions at Lake Francis on the Illinois River are highly relevant as a cause of elevated phosphates downstream from its location. Yet, the State has claimed that this document is protected by attorney-client privilege notwithstanding the fact that this document was located within the documents produced at the OCC, and not the OSRC or the AG's offices, and that it was created in 1989. The purported recipient, Trevor Hammons, could not have actually

received the document. According to the Oklahoma Bar Association website, John Trevor Hammons was not admitted to the Oklahoma Bar until September 28, 2004. (Exhibit 10, website printout from Oklahoma Bar Association.) Which presents the following questions: (1) was Trevor Hammons the actual recipient of this letter; and (2) how far is the State willing to go to in order to keep relevant documents out of the Defendants possession?

Without proper privilege logs, neither Peterson nor the Court can determine whether the privilege asserted actually applies to the respective communication. Because the State has failed to provide the requisite information as required by FED. R. CIV. P. 26 (b)(5) and N.D. LCvR 26.4, it has failed to meet its burden to proving its claims of attorney-client privilege as to each of the challenged items on its agencies' revised privilege logs. (*See* Exhibit 8). Accordingly, these claims should be stricken and the documents produced immediately.

C. THE STATE HAS FAILED TO PROVIDE INFORMATION SUFFICIENT ON ITS LOGS TO ESTABLISH ITS CLAIMS OF WORK PRODUCT PROTECTION

1. The Information and Documents Sought by Peterson are Discoverable

The State is wrongfully withholding documents that are responsive to Peterson's discovery requests pursuant to unsubstantiated work product claims. First, the State must demonstrate that it prepared the documents it is withholding in anticipation of or for litigation. In many instances, the State has refused to provide this minimal information. Second, assuming an arguable claim for work product exists, many of the entries on the privilege logs do not reflect that the documents being withheld are closely related to this lawsuit, and thus, they should be produced. Finally, even if the work product doctrine applies, Peterson easily meets the substantial need and exceptional circumstances tests for discovery of otherwise protected under Fed. R. Civ. P. 26(b)(3) and 26 (b)(4).

2. The State Must Demonstrate the Documents Were Prepared in Anticipation of Litigation

The federal and local rules require a party claiming work product protection to provide sufficient information for the receiving party and the Court to assess the validity of the claim. FED. R. CIV. P.26 (b)(5) and N.D. LCvR 26.4. Again, the State has failed to meet its burden. With very few exceptions, the State has failed to identify the anticipated or actual litigation for which the documents were created. Peterson has narrowed its challenge to only those documents where, based upon the very limited information given by the State provides no clue as to the identity of the subject litigation. Peterson has attached as Ex. "11" hereto, a list those privilege log entries where it contests the State's claims of work product. Peterson has repeatedly asked the State to provide this information so that it may gauge the validity of the State's claims as to the documents identified on Exhibit 11, but was repeatedly turned away.

Unlike the attorney-client privilege, federal law provides the work product doctrine in diversity cases. *See Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 702 (10th Cir. 1998). The work product doctrine embodied in FED. R. CIV. P. 26(b)(3) protects documents, things and mental impressions of a party or his attorney which were developed or prepared for or in anticipation of litigation or trial. The purpose of the work product doctrine is to protect the efforts of attorneys in preparing for litigation or trial without undue interference or fear of intrusion or exploitation of one's work by an adversary. *See American Casualty Co. v. Healthcare Indemnity, Inc.*, 2001 WL 1718275, *2 (D. Kan. 2001)(citing *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). The party asserting work product protection has the burden of making a "clear showing" establishing the elements of the doctrine. *See American* at * 2; *McCoo v. Denny's Inc.*, 192 F.R.D. 675, 683 (D. Kan. 2000). Thus, a blanket claim that work product applies is not sufficient to satisfy the burden. *See id.* All elements of the immunity must

be established with competent evidence and cannot be "discharged by mere conclusory or ipse dixit assertions." *See id.*

In order to show a valid claim of work product immunity, a party must demonstrate:

(1) Documents and tangible things are otherwise discoverable;

(2) *Prepared in anticipation of litigation or for trial*; and

(3) By or for another party or by or for that party's representative.

See Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, 330 (3d ed. 1997); *see also Raytheon Aircraft Co. v. U.S. Army Corps. Of Eng'rs*, 183 F.Supp.2d 1280, 1287-88 (D. Kan.2001). The threshold determination in determining the validity of a claim of work-product is whether the material was "prepared in anticipation of litigation." Thus, it is essential that the State identify the proposed or actual litigation for which the document was created. In fact, it is the State's burden to show that "the primary motivating purpose behind the document or investigative report must be to aid in possible future litigation." *Dawson v. New York Life Ins. Co.*, 901 F.Supp. 1362 (N.D. Ill. 1995)(citing *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982)).

Despite Peterson's numerous requests, the State has disregarded its obligation to supply this essential information. Rather, the State relies upon overly generic statements such as "litigation," "document request" and other general subject matter descriptions. (Exhibit 11, OWRB Privilege Log No. 25, 27, and ODEQ Privilege Log No. 104). These descriptions amount to the pure *ipse dixit*, which the federal courts have condemned. *See McCoo*, 192 F.R.D. at 683. By refusing to identify the litigation relating to each of these contested work product claims, the State is sandbagging Peterson in order to blanket regular agency activities with work product protection in order to deny the it access to critical evidence. The State's behavior should

not be permitted, and thus, Peterson respectfully requests the Court to order the State to immediately produce these documents.

3. The State's Claim of Work Product as to Many Entries on the Privilege Logs Are in Actions Which Are Not Closely Related to this Litigation

The State is improvidently claiming work product protection over documents, which clearly are not closely related to the instant lawsuit. This Court recognized the "closely related" doctrine in the case of *Winton v. Board of Commissioners of Tulsa County*, 188 F.R.D. 398 (N.D. Okla. 1999). Therein, this Court noted that the Tenth Circuit has recognized the extension of the work product doctrine to materials prepared in anticipation of litigation A to subsequent litigation B *at least* where litigation B is closely related to litigation A. *Id.* at 401. The Court found that documents created by Tulsa County Commissioners in anticipation of litigation with the United States Department of Justice under the Civil Rights of Institutionalized Persons Act extended to the subsequent *Winton* case involving four inmates, who sued the Commissioners for civil rights violations under § 1983. It is evident that the two cases were related as they stemmed from similar alleged conduct by the Tulsa County Sheriff's office. *See id.*

Other courts within the Tenth Circuit have come to the same conclusion. In *American Casualty Co. v. Healthcare Indemnity, Inc.*, 2001 WL 1718275, *5 (D. Kan. 2001), the District of Kansas court held that where two cases derived from the same set of facts, a document prepared in anticipation of one litigation stemming from those facts would maintain its work product protection in the other. As did this Court, the District of Kansas court reasoned that the Tenth Circuit in *Frontier* "held that '[w]ork product remains protected even after the termination of the litigation for which it was prepared in those instances where the subsequent litigation is 'closely related' to the underlying suit." *Id.*, at *5 fn. 6 (citing *Frontier v. Gorman*, 136 F.3d

695, 703 (10th Cir. 1998)(emphasis added). Ultimately, whether one piece of litigation is "closely related" to another is a fact specific analysis.

Courts have found that a similar analysis applies to the opinions of an expert "who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial" pursuant to FED. R. CIV. P. 26(b)(4)(B). *Employer's Reinsurance Corp. v. Clarendon Nat'l Ins. Co.*, 213 F.R.D. 422, 426 (D. Kan. 2003). In *Employer's*, the court found that the Tenth Circuit's holding in *Frontier* also applied to the opinions and work product of experts who fall under FED. R. CIV. P. 26(b)(4)(B) because the relevant language is virtually identical to that of FED. R. CIV. P. 26(b)(3), and therefore, expert work product from another case must be "closely related" to be protected from discovery in the instance case. *See id.*

Though the Court is required to apply the federal work product doctrine State's claims. Here too, an absurdity would result if the federal doctrine protected a record that the state law made public. In his evaluation of the confidentiality of records maintained by a district attorney, the Oklahoma Attorney general concluded that although the ORA permits district attorneys to keep litigation and investigatory reports confidential, such confidentiality does not extend to other files in which the document is found. 29 Okla. Atty. Gen. Op. 280, 1999 WL 652454 (citing OKLA. STAT. tit. 51, § 24A.12 and 24A.20). He opined further that if a document which may have been a part of a state or municipal attorney's file has been provided to another governmental body where no general privilege or confidentiality exists, those documents become available for public inspection and copying. *Id.* Moreover, the Oklahoma Supreme Court reasoned that investigation reports of a district attorney may be kept confidential under the ORA

only so long as that attorney is actively engaged in his investigation. *See Saxon v. Macy*, 795 P.2d 101, 102 (Okla. 1990).

In this case, most of the documents over which the State has claimed work-product protection: (1) do not involve the Defendants in this case; and (2) do not involve poultry operations or poultry litter. Instead, the documents the State is withholding involve mining operations, a uranium facility, point source dischargers, and other entities regulated by various state agencies. The only thing that these activities and entities have in common with this lawsuit is that they all involve the same geographic area - the IRW. Notwithstanding the fact that it is not clear under what circumstances these documents were created, *e.g.* whether they were created as a part of the agencies' normal course of business or in anticipation of litigation, it is evident from the limited amount of information contained in the entries on the State's privilege logs that the circumstances in which those documents were created are markedly different then those alleged in this case by the State against the Defendants.

Peterson offers the following examples from the State's agencies' privilege logs as an illustration of the State's untenable attempt to hide documents under the cloak of work product protection:

1. ODEQ Revised Privilege Log No. 7 – This entry on ODEQ's privilege log states that a letter from Martha Penisten to Barry Stephensen on July 8, 2003, transmitting CDs from Kelly Hunter Burch relating to the regulation of hazardous waste of Sequoyah Fuels Site in Gore, Oklahoma is protected by attorney work product under FED. R. CIV. P. 26(b)(3). Barring the fact that it is not clear as to whether this document was prepared in anticipation of litigation, it is impossible to imagine a set of circumstances where regulations regarding hazardous waste at Sequoyah Fuels are closely related to the land application of poultry litter within the IRW. There are fourteen other entries which clearly involve Sequoyah Fuels on the ODEQ revised privilege log. Notably, Sequoyah Fuels has been identified by the Defendants as potential contributor to the alleged pollution of the IRW. (Exhibit 11.)

2. ODEQ Revised Privilege Log 105 – The State has claimed that a facsimile from December 13, 1995, between Jeannine Hale and Wayne Craney regarding a discussion

about "Worley" is protected by attorney work product under FED. R. CIV. P. 26(b). A document created in 1995, over ten years ago relating to a gravel mining operation in the IRW is not closely related to the State's allegations against the Defendants in this case. There are three other entries on the ODEQ revised privilege log where the State is claiming attorney work product over documents involving Worley's gravel mining operations. Consequently, Jock Worley and Worley Gravel have been identified as a potential contributor to the alleged pollution of the IRW. (Exhibit 11.)

3. ODEQ Revised Privilege Log Nos. 9, 10, 24, 31 and 41 – According to the State each of these entries is protected by FED. R. CIV. P. 26(b)(4). The State has indicted by claiming protection under FED. R. CIV. P. 26(b)(4) that each of these entries involves an expert. However, the State has failed to indicate whether these alleged experts were employed only for trial preparation under subsection (b)(4)(B) or were expected to or in fact did testify at any trial involving Sequoyah Fuels pursuant to (b)(4)(A). Regardless of whether these experts testified or not, it is difficult to imagine a scenario where these reports are closely related to the State's allegations that the application of poultry litter upon lands within the IRW has caused irreparable damage to the IRW. For instance, ODEQ log entries 9, 10 and 24 have to do with the reclamation plan for Sequoyah Fuels, while 31 and 41 addresses a ground water plan for Sequoyah Fuels. Once again, the State's purpose in excluding these documents is clear - Sequoyah Fuels has been identified by the Defendants as a potential contributor to the alleged damage to the IRW. (Exhibit 11.)

4. OWRB Revised Privilege Log No. 9 – The State is claiming that a memorandum written on April 13, 1981, regarding "[p]ollution remedies and jurisdictional considerations under the AR-OK Compact Commission" is protected work product. This entry is an exemplar of the State's reasoning that regardless of when a document was created or whether anticipated or actual litigation was involved, if a document addresses anything that might support the Defendants' defenses in this matter, the State has claimed it is protected under the work product doctrine. (Exhibit 11.)

5. OSRC Revised Privilege Log Nos. 11 and 12 are additional examples of the State's self-serving analysis of the work product protections offered by FED. R. CIV. P. 26(b)(3). In these entries, the State is claiming work product protection over letters and facsimiles from December 19, 1989, and June 19, 1990, which contain the State's analysis of Lake Frances. As discussed previously, Lake Frances is thought to be a significant contributor of phosphates to the IRW. Clearly from these entries, the OWRB thought Lake Frances presented a concern. The State's claim of work product over these documents as well as any other document dealing with Lake Frances or any other potential contributor of phosphates to the IRW is ill-placed. (Exhibit 11.)

Interestingly, the common thread that runs throughout the documents subject to Peterson's challenge is that they involve entities which the Defendants have identified as potential contributors to the environmental damage the State contends exists in the IRW.

Peterson submits that no work-product protection exists for the documents listed above or the other documents identified on Exhibit 11 as they are not matters, which are closely related to the State's claims or the Defendants' activities within this case. Thus, the State's claims of work product protection as to the documents identified on Exhibit 11, should be stricken and the documents should be turned over to the Defendants immediately.

4. Even if the Attorney-Work Product Doctrine Applies to the State Agencies' Privilege Logs, the Information and Documents Sought are Discoverable Under Federal Rules 26(b)(3) or 26 (b)(4)(B).

As Peterson has demonstrated in its arguments above, the State has no valid claim of attorney work-product with respect to the contested documents identified from the privilege logs of ODEQ, OWRB, OCC, OSE and OSRC. (*See* Exhibit 11). However, in the event this Court finds that the documents sought are protected they should, nonetheless, be produced. FED. R. CIV. P. 26(b)(3) and 26 (b)(4)(B) set forth the circumstances where otherwise protected documents are discoverable.

For instance, FED. R. CIV. P. 26(b)(3) states:

> [a] party *may obtain discovery of documents and tangible things* otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative… *upon a showing that the party seeking discovery has substantial need* of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

In determining "substantial need" pursuant to FED. R. CIV. P. 26(b)(3), the courts distinguish between "ordinary" work product, which consists of "raw factual information," and "opinion work product," which consists of thoughts and mental impressions of attorneys. *See Frontier Refining, Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 704 n. 12 (10th Cir. 1998). A

lesser showing of need is necessary to obtain ordinary work product. *See Sinclair Oil Corp. v. Texaco, Inc.*, 208 F.R.D, at 329, 334 (N.D. Okla. 2002).

The documents identified by the State on its privilege logs involve the activities of the State's agencies within the IRW. While continuing to deny the State's allegations against it, Peterson in its Answer to the Second Amended Complaint has alleged that the State is a potentially responsible party and has engaged in activities which have contributed to the alleged damage to the IRW. (*See* Dkt. 1236, Peterson Farms' Answer to Second Am. Complt., ¶¶ 76, 88, 116, 124 and Affirmative Defenses ¶¶ 39, 46 and 50.) Peterson has the right to obtain evidence from the State which demonstrates the State's knowledge of and the manner in which a particular agency handled a potential environmental condition within the IRW. What the agency personnel observed and how they managed the potential condition is absolutely vital and highly relevant to Peterson's defense in this matter. Yet, Peterson has no other means to obtain these documents because the State has placed under the lock and key of their privilege claims. Keeping these highly relevant documents from Peterson will likely result in irreparable damage to Peterson's ability to defend itself against the State's claims.

Furthermore, FED. R. CIV. P. 26(b)(4)(B) focuses on the discoverability of facts or opinions of non-testifying experts. This rule provides that:

> [a] party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and *who is not expected to be called as a witness at trial* only…*upon a showing of exceptional circumstance* under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Id. (emphasis added). Peterson is not contesting any of the State's privilege log entries where it is apparent that the State's claim for work product protection under FED. R. CIV. P. 26(b)(4) is related to this lawsuit. The problem arises as a consequence of the State's claim of work product

protection for non-testifying expert materials from unrelated matters. (Exhibit 11.) While the State has invoked the provisions of Rule 26(b)(4) as a basis for withholding certain documents, they have done so without any indication on the revised privilege logs of whether the experts who apparently created the document or have knowledge of the facts contained therein are expected to testify, have testified or were merely consulting experts involved in a previous matter.

Regardless of the expert's current status, the rule permits a party to discover facts known to an expert where the party seeking the discovery can demonstrate "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." FED. R. CIV. P.26(b)(4)(B). "Exceptional circumstances may be shown when (1) the condition observed by the expert is no longer observable…." *Hollinger Int'l, Inc. v. Hollinger, Inc.*, 230 F.R.D. 508, 522 (N.D. Ill. 2005) (citing *Ludwig v. Pilkington N. Am. Inc.*, 2003 WL 22242224, at *3 (N.D. Ill. September 29, 2003).

Each of the documents over which the State is claiming work product protection pursuant to FED. R. CIV. P. 26(b)(4) related to Sequoyah Fuels is dated sometime within the years 2003 and 2004, and most likely contain observations of these experts related to that time period or before. (Exhibit 11.) It is safe to assume that if the Defendants visit the Sequoyah Fuels facility, the conditions that existed in 2003 or before would not exist today. The same is true for the other documents where Peterson has contested the State's claim for work product under FED. R. CIV. P. 26(b)(4). By way of further example, any observations made today of the conditions related to the City of Watts sewage lagoon or the property where Jock Worley obtained his mining permit would not be the same as they were in 1998 and 1999. (Exhibit 11.) Because Peterson has shown that the conditions observed by the experts who drafted the documents in

unrelated matters in the past cannot be repeated today, it has shown the exceptional circumstances necessary under FED. R. CIV. P. 26(b)(4) to compel the disclosure of those documents.

Because the documents that the State seeks to cloak in work product protection are vital to Peterson's defense, and because Peterson has no other means of obtaining the information, it has not only shown a substantial need, but exceptional circumstances which demand the production of the documents identified on the State's agency privilege logs as identified in Exhibit 11.

D. THE STATE HAS FAILED TO JUSTIFY MAJOR CHANGES BETWEEN THE ORIGINAL PRIVILEGE LOGS AND THE REVISED PRIVILEGE LOGS.

On June 19, 2007, Peterson addressed with the State several entries from the agencies' revised privilege logs where the State significantly changed information that was on the original logs. Peterson asked the State to provide justification for the changes to the following entries no later than Monday June 26, 2007:

1. OCC Revised Privilege Log Nos. 1 and 2. The dates on both of these entries were changed significantly from the original privilege log. The date for both of the entries was changed from July 8, 1994 to November 6, 2006. (*Compare* Exhibit 12 [Original Agency Privilege Logs] and Exhibit 4).

2. OCC Revised Privilege Log Nos. 4 and 5. The dates on both of these entries were also changed. Log No. 4 was changed from June 25, 1994 to July 6, 1994, and Log No. 5 was changed from March 14, 2003 to April 4, 2003. (*Compare* Exhibit 12 and Exhibit 4.)

3. OCC Revised Privilege Log Nos. 8, 10-20. On the original log, only the month and day were identified. The revised privilege logs now reflect the year the document was created. Peterson questioned the State as to why the year was not put on the original log if it was available, and if it was not available, where the State obtained the year for these documents. (*Compare* Exhibit 12 and Exhibit 4.)

4. OWRB Revised Privilege Log No. 3. On the original log, the subject matter was described as "attorney notes" on "investigation." On the revised log, the subject matter was described as "attorney notes" on "document production for poultry litigation."

Peterson asked the State to identify the reason for the change to this subject matter description. This change could potentially change the applicability the work product doctrine to this document. (*Compare* Exhibit 12 and Exhibit 4.)

5. ODEQ Revised Privilege Log No. 60. On the original log, the recipients of the memorandum described at Log No. 60 were identified as Dave Smit and Mark Canley, neither of whom are attorneys. On the revised log, the recipients have been changed to Kelly Burch and Trevor Hammons, who are both counsel for the State. Peterson requested the State provide justification for such a substantial change in the names of the recipients. The State claims that this document is protected by attorney-client privilege. Such a privilege would not exist based upon the original description of the document as no attorney was identified as either the author or the recipient of the document. (*Compare* Exhibit 12 and Exhibit 4.)

In the Parties' Rule 37 conference on July 2, 2007, the State indicated that it would provide justification for these changes by July 13, 2007. Even though the State indicated through an informal communication that the changes may be the result of computer error, it has not identified which of the contested entries were changed as a result of that alleged error, or how the error occurred. Ultimately, the State has provided no justification for the substantive changes addressed in Peterson's June 19, 2007 letter. (Exhibit 5.) Because the State has refused to provide the information requested, Peterson respectfully requests that the Court find that the claims of work product and attorney-client privilege are without basis, and compel the State to provide these documents, or in the alternative, require the State to provide the information requested and conduct an *in camera review* of the documents to determine the validity of the State's description and claim of privilege.

E. THE STATE HAS NOT PRODUCED THE ORIGINAL DOCUMENTS THAT WERE REMOVED FROM THE ORIGINAL PRIVILEGE LOGS.

When the State revised its agency privilege logs, it removed multiple documents that had been identified on the original agency logs. (*Compare* Exhibit 12 and Exhibit 4.) Peterson's June 19, 2007 letter to the State provided a list of those documents which apparently had been withdrawn. (Exhibit 5.) In the Parties' second Rule 37 conference, the State indicated that it

would produce these documents no later than July 20, 2007. To date, Peterson has not received these documents from the State. Thus, Peterson respectfully requests that the Court compel the State to produce these documents immediately.

IV. CONCLUSION

The State has refused after numerous requests to provide the information necessary for Peterson to evaluate the State's claims of attorney-client privilege and work product on its agency privilege logs. Undoubtedly, the burden of making a clear showing of a valid attorney-client privilege or work product claim rests with the State. By failing to meet this burden, the State's claims for privilege and work product protection fail.

Based upon the foregoing, Peterson respectfully requests that the Court compel the Defendants to turn over all of the documents identified on Exhibits 5, 7, and 11, attached hereto. Moreover, Peterson respectfully requests that the Court require the State to turn over the seventeen documents where it has made substantial changes between the original and revised logs without justification for such changes, or in the alternative, require the State to provide the justification for the changes, and such documents to the Court for an *in camera* review.

Respectfully submitted,

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I certify that on the 19th day of September, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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